

John Murray's petition in his own right
June 23. 1760.

ANSWERS for Thomas Pringle of Symington,

To the Petition of John Murray late Tenant in Fairnibirsh.

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WILLIAM MURRAY the petitioner's father, who was married to Christian Pringle, a relation of the respondent's, possessed a farm of 300 merks rent preceding the year 1731; but not content with that small possession, he applied to the respondent to use his interest with his father, to give him a tack of the farm of Fairnibirsh, which was then open, and was reckoned an exceeding easy rented farm; which the respondent obtained, and he entered to the possession thereof at Whitsunday 1731. But as the stock upon his 300 merk farm was by no means sufficient to stock his new farm of 1000 merks rent, he got two of his wife's friends to assist him with their credit for stocking the farm, and to become cautioners for payment of the rent. And, about the end of the year 1732, being threatened with diligence for payment of the arrears of rent of his former possession, he again applied to the respondent for his assistance; and got from him the sum, for which he granted the bill now in question. In these circumstances it is evident, that the tenant needed great forbearance from his master as to the payment of his rent, in order to extricate him from the difficulties he had brought himself under, by taking a farm so much above his stock; and it is acknowledged by the petitioner, that his father met with such gentle treatment from his master, he says, that soon after his father's death in the 1744, a clearance was made between the respondent and him, with respect to his father's possession; and, in place of the former partial receipts, a discharge upon stamped paper was granted of all his bygone rents; which, by

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the by, shows that he was possessed of all his father's vouchers of payment ; so could have obtempered the Lord Ordinary's interlocutor, 24th February 1758, ordaining him to produce the discharges of rent granted to him or his father since the date of the bill in question, that it might appear whether there had been any accounting betwixt parties on that bill ; which the petitioner has thought fit not to comply with ; and, in the 8th page of his petition, gives this reason for it, that a fitted account, relative to the rents alone, would rather have made against than for the petitioner. A further instance of the master's tenderness to William, was shown to him in 1738, by discharging the cautioners in the tack, as by that time he had considerably bettered his circumstances.

The petitioner says, That, in the 1753, the respondent having taken some umbrage, thought proper to raise a process against him for payment of a greater arrear of rent than was due at the time, and for the full contents of the bill which he let lie over for a year ; and, in the mean time, took payment of his rents ; and at length, in the 1754, got a decret for half an year's rent, and the contents of the bill, deducting L. 5 paid, as marked thereon. As to which it is unnecessary to trouble your Lordships with an account of the reason of the respondent's taking umbrage with the petitioner ; all he shall say is, that the petitioner behaved most insolently to him : and had it not been for the regard he had to his father, who was a quiet good man, and to his son for his sake, and as he was a relation of his own, he would have proceeded instantly in his process ; but hoping, by executing the summons against him, to bring him to a more decent behaviour, he forbore insisting therein, and in the mean time took what payments of rent he made him. But finding that the petitioner rather grew worse, and proceeded even to threaten to cane him in his own house, he found it necessary to take his decret for the rent then due, and for the remains of the bill. But still, so tender was he of distressing his friend, that he did not give him

him a charge thereon for two years thereafter. This lenity the petitioner now endeavours to make a handle of against the present claim ; the respondent believes, that one great reason for the petitioner's ill temper proceeded from his being refused a new tack.

The petitioner says, That he has prevailed as to the question of the repairs, and the respondent has acquiesced in the interlocutors thereon ; but here the petitioner misrepresents the case. By the tack, the master, in case reparations should be needed, was bound to furnish the great timber, and to pay the workmens wages ; and the tenant was obliged to give meat and service, and to carry all the materials, which in the country is reckoned a large half of the expence. In the year 1754, or 1755, the petitioner represented to the respondent, who was then very valetudinary, that the houses needed some repairs ; but as the respondent was not able to go and see the houses himself, he desired the petitioner to get him notice what it would take to repair them. The petitioner reported to him, that it would take about L. 6 to repair them ; upon which he promised to allow him L. 3 ; but, in place of that, the petitioner brought in an account of L. 8, 10 s. as the repairs payable by the master. And several objections being made against his account, the Lord Ordinary, in the interlocutor now reclaimed against, 9th February 1759, “ sustained the suspender's claim “ for the sums therein contained, except the sum of L. 2, “ 10 s. contained in the receipt for building a new room, “ which the Lord Ordinary finds does not fall under the “ clause in the tack ; without prejudice to the charger to “ prove, that the furnishings and tradesmens wages contained “ in the other receipts were unnecessarily laid out : ” which shews, that the petitioner has not prevailed in that question ; for, besides the L. 2, 10 s. struck off, it is still competent for the respondent to bring a proof, whereby he expects he could considerably cut down the other articles ; but as he offered to allow L. 4 in the beginning of the process, to prevent further
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dispute, he does not think the difference is worth the while of leading a proof.

The petitioner reclaims against the interlocutors of both the Ordinaries sustaining the respondent's claim of the bill, and proposes to establish three points, which shall be considered separately. The first is, That all action on the bill is lost by the charger's taciturnity. For supporting this, he endeavours to lengthen the taciturnity more than it will bear : He says the bill is dated in the 1732, no document taken thereon earlier than the 1754, nor payment demanded till the 1756. But your Lordships will be informed, that the bill, though dated 16th December 1732, was not payable till 15th December 1733. Your Lordships will likewise be informed, that the summons for payment of this bill was raised and execute against the defender upon the 26th April 1753, which is eight months within the twenty years : and it has been always reckoned that an execute summons is a good interruption against prescription, though neither the decret nor the charge of horn-ing follow instantly thereon. This the respondent has noticed, as it cuts down the petitioner's whole argument upon the prescription of this bill, and differences this present case from all the decisions founded on by him ; for in these the taciturnity had continued for above twenty years. He acknowledges that your Lordships have not established what may be called a prescription in the strict sense of the word, but have supported the legal presumption arising from a taciturnity exceeding twenty years. The respondent does not think himself under any necessity of controverting this point, as his taciturnity did not exceed twenty years ; and the petitioner does not pretend that your Lordships ever cut down a bill on account of taciturnity within a shorter time, though he apprehends he would be founded in law to say, that bills continue valid obligations for forty years. The 29th act 1469, which introduced prescriptions, says, that obligations not followed forth in forty years shall be prescribed ; from which it
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it is plain, that all obligations have that endurance, except where a subsequent law has made the time shorter ; and till a law be made, shortening the endurance of bills in this country, neither the ordinances in France, nor the statute of limitations in England can take place here. He will allow, that in mercantile bills a shorter endurance may be convenient ; but in an inland bill, or a bill taken as a security for money betwixt a master and tenant, there seems not to be the same reason ; and he is founded in this distinction by the decret of the court of the last resort in the case of Mr Thomas Rigg, observed by the author of the Institute of the Laws of Scotland, book I. title 13. par. 31. *in fine*. In that case your Lordships refused to sustain action upon the bills which had been allowed to lie by for twenty-eight years. This judgment, upon an appeal, was reversed ; but the author observes, that it was on certain peculiarities observed in the decret of the higher house, particularly, that the bills in question were not the subject of commerce. He might also observe, that in the case, Wallace *contra* Lees, January 31. 1749, the bills in question, besides the taciturnity of twenty-seven years, bore annualrent and penalty, which the court for many years back have considered as a nullity. But he apprehends, it is needless to insist any further on this point, as the bill in question has not been suffered to lie by, undemanded, for twenty years.

The second point proposed to be established by the petitioner for cutting down this bill, was, That the continued transactions betwixt the parties, during that time, extend the legal presumption to positive evidence of the falsity, or at least of the payment of the bill. The transactions mentioned by him are no other than what have been already taken notice of, That William Murray the acceptor was tenant to the respondent's father during his life, and continued to be tenant during the currency of the said tack ; that in the 1743, he got a new tack for fifteen years, upon which the

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petitioner did possess till the 1754, without any intimation made to him of this bill; that both he and his father paid their rents, and the payment of the bill was never insisted on till the 1756; which the petitioner says, must carry conviction, that the bill was either not just, or was paid, or remitted by the creditor. The respondent apprehends, that a very short answer may serve to this. The petitioner has not pretended to alledge, that the bill was not a just true bill; only, that, from the long delay of payment, it was to be presumed not to be just. The respondent has already shown, that the lending the money at first was out of friendship to his tenant; and it will easily appear to your Lordships, that the delay of seeking payment thereof proceeded from the same cause, and the tenant was a profiter thereby; for by that means he was enabled gradually to pay off the debts he had contracted in stocking his farm. As to the presumption of its being paid, that must fly off, when it is considered, that the petitioner is master of all the vouchers of payment made by his father or himself, and has refused to produce them, when ordered by the Lord Ordinary, lest they should make against him. The petitioner shews a good deal of assurance in affirming, that he knew nothing of the bill, nor that any words had passed betwixt him and the respondent thereupon, from his father's death up to the 1754: he well knows the falsity thereof; but the respondent apprehends, that, in this case, it is not material; he knew the acceptor was honest, and had mended his circumstances by his possession of the farm; so that he was in no apprehension of losing his debt, by his acting the friendly part to him, in delaying to seek payment; and his continuing to show the same friendship to the petitioner, ought not to be made a handle of against him for inferring the least presumption of the injustice of the debt; it shows the highest ingratitude in the petitioner.

The third and last point proposed to be established by the petitioner, was, That his objections against the debt were not taken

taken off by the receipt of a partial payment upon the back of the bill, nor can be removed by the respondent's oath. He says, That a receipt wrote by the creditor and possessor of the bill, supported by no other adminicle, can never interrupt prescription, or preserve action, which would otherwise be lost ; that it is only good against the holder of the bill. To this it is answered, *1mo*, That though no receipt had been on the back of the bill, it was not prescribed, when the demand was made, even supposing the endurance of bills had been for twenty years, as the petitioner contends. *2do*, A partial payment of a bill can be no otherwise ascertained, but by the creditor's marking it upon the back of the bill ; a partial separate receipt would not have been safe to the debtor, it might have been lost, and the bill itself might have been indorsed for an onerous cause, and possibly the demand made when the drawer of the bill was bankrupt ; and therefore a receipt on the back of the bill is the chief security for the debtor ; and if any fraud was intended by either party, the presumption will rather lie against the debtor, that he would secrete the separate receipt of payment, in order to get free of the debt, than that the creditor had marked a payment in order to keep it up, which, in this case, was absolutely unnecessary, as the bill, was a good subsisting ground of debt without it. And the respondent apprehends, that the decision, *Wallace contra Lees*, cannot support the petitioner's argument in this case ; for there the bills were twenty-seven years old, and bore annual rent and penalty.

On this head the petitioner says, That, in the libel before the sheriff, no mention is made of any partial payment ; but the full contents of the bill concluded for ; and that after the decerniture, the extract bears, that the procurator desired, that it should be restricted as to the bill. As to which your Lordships will be informed, that the procurator who raised the libel, did indeed omit mentioning in the libel the receipt upon the back of the bill, and did libel for three terms rent
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which were due ; but, before pronouncing the decret, the petitioner had paid two terms rent ; so that it was necessary to make the restriction, both as to the rent and as to the bill. It appears, that the procurator, at the first calling of the cause, page 4. of the decret, mentioned this sum marked on the back of the bill ; and the grand decerniture which follows, decerns only for the remainder ; so that there is nothing in this observation. The petitioner says, That observations of this kind cannot be reckoned injuries to the respondent, as they are naturally produced by obvious circumstances. The respondent cannot help thinking, that these reflections are thrown out only with a view to injure him, and with a view, if possible, to get free from payment of a just debt, the payment of which has been so long superseded, only to do service to the petitioner and his father.

The petitioner, in the last place, finds fault with the Lord Ordinary's last interlocutor, ordaining the respondent to give his oath in supplement. As to which the respondent needs not dispute much with the petitioner ; he is ready, in obedience to the Lord Ordinary's interlocutor, to give his oath, that the debt, as claimed, is truly due ; but he apprehends, that his debt is a good debt, without his oath ; and that he is under no necessity of having recourse to the petitioner's oath. The observation made by the petitioner from Sir George Mackenzie, does not meet the case. *1^{mo}*, A bill does not need to be holograph ; so there is no legal necessity for its being pursued on within twenty years. *2^{do}*, This bill was pursued on within the twenty years ; so there is no need of the oath either of the subscriber or of his successor to support it.

In respect whereof, &c.

GEO. PRINGLE.